Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-296 OF 1989
ABDUL HAMID OMAR LP, GUNN CHIT TUAN AND JEMURI SERJAN SCJJ
29 DECEMBER 1990

Administrative Law — Judicial review — Reasonableness of award of Industrial Court — Whether there was manifest unreasonableness — Errors if at all within jurisdiction — Court not to decide on merits of decisions

Tan Seng Khow, who was a clerk employed by the appellant company, was in charge of the preparation and payment of non-executive staff salaries and related matters. A number of charges were preferred against him and after a domestic inquiry he was found guilty and dismissed. The respondent union took up the matter on his behalf and the industrial dispute which ensued was eventually referred by the minister to the Industrial Court. The Industrial Court found that none of the charges had been proved against Tan Seng Khow and therefore held that the dismissal was without just cause or excuse. The Industrial Court ordered payment of compensation, including backwages, compensation in lieu of reinstatement and EPF contributions. The appellant company applied to the High Court for certiorari to quash the award. The High Court dismissed the application and appellant company appealed to the Supreme Court.

Held, dismissing the appeal:

(1) Judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable.

(2) The Industrial Court in this case had heard evidence from both sides and it came to a decision exculpating Tan Seng Khow. It is not the function of the High Court in the exercise of its supervisory jurisdiction to hear a dispute de novo and decide it on its merits. This is not a case where the Industrial Court had acted on no evidence or had come to a conclusion which on the evidence it could not reasonably come to.

(3) There is no basis to come to the conclusion that the decision of the Industrial Court in this case was in excess of jurisdiction or unreasonable and therefore a nullity. The court also rejected the contention that the decision of the Industrial Court was so manifestly unreasonable that no body of persons could have reached it because there is no basis for the court to reach such a conclusion. The Industrial Court had acted within the four corners of the dispute and in arriving at its decision it did not reach it absurdly.

(4) The Industrial Court is given wide powers in settling trade disputes under the Industrial Relations Act 1967 and it was clearly in exercise of these powers that the Industrial Court awarded the compensation to comprise backwages, bonus, compensation in lieu of reinstatement and employer's contribution to the Employees Provident Fund.

(5) Even assuming the Industrial Court was wrong in construing back wages or the compensation as a whole as wages in order therefore to attract the application of the Employees Provident Fund Act 1951, such errors are within jurisdiction and not errors going to jurisdiction to render the award a nullity.

[Bahasa Malaysia summary

Tan Seng Khow, seorang kerani berkhidmat dengan syarikat perayu telah bertanggung jawab menyedia dan membayarkan gaji pegawai bukan eksekutif dan perkara berhubung dengannya. Beberapa tuduhan telah dibawa terhadapnya dan selepas penyiasatan domestik ia telah didapati bersalah dan dibuang kerja. Kesatuan sekerja-responden telah membela perkara itu baginya dan pertikaian perindustrian it telah akhirnya dirujukkan oleh menteri kepada Mahkamah Perusahaan. Mahkamah Perusahaan berpendapat tuduhan-tuduhan itu tidak dibuktikan terhadap Tan Seng Khow dan memutuskan pembuangan kerjanya adalah tanpa sebab atau alasan yang berpatututan. Mahkamah Perusahaan memerintahkan pembayaran pampasan termasuk gaji terkebelakang, bonus, pampasan menggantikan penempatan semula dan caruman EPF. Syarikat-perayu telah memohon mendapat certiorari dari Mahkamah Tinggi untuk membatalkan award itu. Mahkamah Tinggi telah menolak permohonan itu dan rayuan telah dibuat ke Mahkamah Agung.

Diputuskan, menolak rayuan itu:

(1) Pemeriksaan kembali kehakiman bukan suatu rayuan akan tetapi ia adalah pemeriksaan kembali cara keputusan itu dibuat dan Mahkamah Tinggi tidak berhak di dalam permohonan untuk pemeriksaan kembali kehakiman itu menimbangkan sama ada keputusan itu sendiri, atas merit fakta-fakta di dalam kes itu, adalah berpatutan dan munasabah.

(2) Mahkamah Perusahaan di dalam kes ini telah mendengar keterangan dari semua pihak dan ia telah membuat keputusan membebaskan Tan Seng Khow dari tuduhan terhadapnya. Bukanlah tugas Mahkamah Tinggi di dalam menjalankan bidang kuasa pengawasannya mendengar suatu pertikaian itu de novo dan memutuskannya atas meritnya. Ini bukanlah suatu kes di mana Mahkamah Perusahaan telah bertindak tanpa apa-apa keterangan atau telah membuat keputusan yang tidak boleh dibuatnya dengan munasabah atas keterangan itu.

(3) Tidak ada asas untuk membuat kesimpulan bahawa keputusan Mahkamah Perusahaan di dalam kes ini adalah melebihi batasan bidang kuasanya atau tidak munasabah dan oleh kerana itu terbatal. Mahkamah juga menolak hujah bahawa keputusan Mahkamah Perusahaan itu adalah begitu jelas tidak munasabah hingga tiada sesiapapun boleh membuatnya oleh kerana tidak ada asas bagi mahkamah mencapai kesimpulan itu. Mahkamah Perusahaan telah bertindak di dalam lingkungan pertikaian itu dan apabila membuat keputusannya ia tidak membuatnya secara tidak munasabah.

(4) Mahkamah Perusahaan telah diberi kuasa yang luas di dalam menyelesaikan pertikaian perindustrian di bawah Akta Perhubungan Perindustrian 1967 dan jelaslah ia telah menjalankan kuasanya itu apabila ia memerintahkan pembayaran pampasan termasuk gaji terkebelakang, bonus, pampasan sebagai ganti perempatan semula dan bayaran caruman majikan kepada kumpulan wang simpanan pekerja.

(5) Sekalipun dianggapkan Mahkamah Perusahaan itu telah tersilap mentafsirkan gaji terkebelakang atau pampasan itu keseluruhannya sebagai 'gaji' dan oleh kerana itu melibat Akta Kumpulan Wang Simpanan Pekerja 1951, kesilapan itu adalah dibuat di dalam bidang kuasanya dan bukan kesilapan yang menjejaskan bidang kuasanya hingga menjadikan awardnya terbatal.]

Cases referred to

1 *Tan Hin Jin & Anor* v *Prabhulal G Doshi* [1971] 1 MLJ 274 (refd)
2 *R* v *Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 KB 338 (refd)

3 *Minister of Labour and Manpower & Anor* v *Paterson Candy (M) Sdn Bhd* [1980] 2 MLJ 122 (refd)
4 *Hotel Equatorial (M) Sdn Bhd* v *National Union of Hotel, Bar and Restaurant Workers* [1984] 1 MLJ 363 (refd)
5 *Goon Kwee Phoy* v *J & P Coats (M) Bhd* [1981] 2 MLJ 129 (refd)
6 *Colonial Bank of Australasia* v *Willan* (1873-4) 5 LR PC 417 (refd)
7 *Chief Constable of the North Wales Police* v *Evans* [1982] 3 All ER 141 (refd)
8 *Ashbridge Investments* v *Minister of Housing and Local Government* [1965] 3 All ER 371
9 *Malayan Banking Bhd* v *Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 (distd)
10 *Associated Provincial Picture Houses* v *Wednesbury Corp* [1948] 1 KB 223 (refd)
11 *R* v *Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek* [1951] 2 KB 1 (refd)
12 *R* v *Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456 (refd)
13 *Anisminic* v *Foreign Compensation Commission* [1969] 2 AC 147 (refd)
14 *Griffiths (Inspector of Taxes)* v *JP Harrison (Watford) Ltd* [1962] 1 All ER 909 (refd)
15 *Bromley London Borough Council* v *Greater London Council* [1983] 1 AC 768 (refd)
16 *Dr Dutt* v *Assunta Hospital* [1981] 1 MLJ 304 (refd)
17 *Employees Provident Fund Board* v *MS Ally & Co Ltd* [1975] 2 MLJ 89 (distd)
18 *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees Union* [1980] 2 MLJ 165 (follid)
19 *R* v *Governor of Brixton Prison, ex p Armah* [1968] AC 192 (follid)
20 *Pearlman* v *Keepers and Governors of Harrow School* [1979] 1 QB 56 (follid)

Legislation referred to
Industrial Relations Act 1967 ss 18, 20(2), 30(5), (5A), (6), 56(1)

Appeal from: Originating Motion No R8-32-45-88 (High Court, Kuala Lumpur)

TM Varughese for the appellant.
KP Gengadharan for the respondent.

Cur Adv Vult

Jemuri Serjan SCJ (delivering the judgment of the court): Tang Seng Khow joined Harpers Trading (M) Sdn Bhd, the appellant company, as a Grade 3 clerk on or about 5 January 1956. He was promoted as Grade 1 clerk with effect from 15 October 1976 and at the time of his dismissal he was earning $1,170 per month with $40 per month as cost of living allowance thus making a total of all-in salary of $1,210 per month. He had been performing his duties of a payroll clerk and was in charge of preparation and payment of non-executive staff salaries and related matters, administration of car loans and the preparation of Kuala Lumpur bank reconciliation and issuing of cheques.

The company by a letter dated 17 December 1985, addressed to Tang Seng Khow preferred six charges against him and suspended him from duty on half pay from 17 to 26 December 1985. The suspension was subsequently extended to 31 December 1985. By the same letter Tang Seng Khow was required to attend a domestic inquiry on 23 December 1985. The six charges are as follows:

Charge 1 : That you failed to submit the SOCSO returns (Borang 8A/B) as and when due in respect of our employees in the following branches of the company:

	Branches	Period involved
(a)	Kuantan	Since May 1984
(b)	Kota Bharu	Since May 1985
(c)	Johore Bahru	Since May 1983
(d)	Penang	Since September 1982
(e)	Malacca	Since November 1978
(f)	Ipoh	Since November 1979

By reasons of your said acts and/or omission on your part in the performance of your duties and responsibilities, you have exposed the company for prosecution.

Charge 2 : That you failed to pay staff salaries in respect of outstation branches for the month of November 1985 by cheque in the normal way on time and caused undue delay by postponing to 2 December instead of 26 November 1985, whereby you exposed the company to embarrassment and adverse criticism.

Charge 3 : That you failed to exercise due care and attention in the payment of overtime pay to Mr Nicholas s/o Anthony Samy, though you prepared the source documents, resulting in excess payments from July to November 1985 and loss to the company. You failed to check the source documents and computer print-out before effecting payments and were thus negligent in your duty.

Charge 4 : That you as a clerk in charge of payroll have paid out to yourself overtime pay in excess of what was due to you in the month of November 1985 when you knew or ought to have known that the payment you received was much in excess.

Charge 5 : That you failed to submit to the Income Tax Department our employees' tax deductions for October and November 1985 on time and unduly delayed them whereby you exposed the company to penalty and embarrassment.

Charge 6 : That you failed to remit to National Union of Commercial Workers members subscriptions deducted from their monthly salary during October and November 1985 on time in breach of the standing instructions and accepted past practice causing embarrassment to the company.

The domestic inquiry which was conducted on 23 December 1985 found Tang Seng Khow guilty on all except the third charge and he was accordingly dismissed with effect from 31 December 1985. The respondent union took issue on his behalf in the matter of the dismissal and thereafter a trade dispute ensued which was referred to the Director-General for Industrial Relations under s 18 of the Industrial Relations Act 1967. As there was no likelihood of the dispute being settled, the minister was notified accordingly who then referred the dispute to the Industrial Court under s 20(2) of the Act on or about 19 August 1986.

The Industrial Court commenced proceedings to hear the dispute on 16 March 1987 and after several intermittent adjournments completed the proceedings on 24 February 1988. Both the company and the union were represented by counsel at the hearing. The Industrial Court found that none of the charges had been proved against Tang Seng Khow and therefore held that the dismissal was without just cause or excuse. As it was not in the interest of both parties to order reinstatement and, considering that by then Tang Seng Khow was already fully employed elsewhere, the Industrial Court handed down on 18 March 1988 an award by way of compensation as an alternative remedy in the sum of $73,000 made up as follows:

(1) Backwages from (dismissal date 3 December 1985) 1 January 1986 to 24 February 1988 as follows:

January 1986 to 31 December 1986 @ $1,255 pm	$15,060
January 1987 to 31 December 1987 @ $1,300 pm	$15,600
January 1988 to 24 February 1988 @ $1,345 pm	$ 2,421
	$33,081

(2) Amount deducted for period of suspension, ie six days in December 1985 $117

(3) Bonus equivalent to two months' salary per year

for	1985	$2,420
	1986	$2,510
	1987	$2,600
		$7,530

(4) Compensation in lieu of reinstatement of one (1) month's salary for each completed year of service, ie 29 years, but up to a maximum of 24 months, ie 24 × $1,345 $32,280

Total $73,008

(5) EPF — The contribution required to be made by the claimant towards Employees Provident Fund for the period 1 January 1986 to 24 February 1988 shall be deducted and paid together with the company's contributions towards Employees Provident Fund to the EPF Board in favour of the claimant within one (1) month from the date of this award.

The company contended that the award of the Industrial Court was erroneous in law in that the Industrial Court acted in excess of jurisdiction and applied to the High Court for certiorari to issue to quash the award. The High Court refused to grant the application for certiorari on the ground that the Industrial Court did not exceed its jurisdiction and that the decision was not perverse because it was supported by evidence. Hence the award of the Industrial Court was affirmed. The appellant company appealed to the Supreme Court against that decision. The appellant's grounds of appeal are reproduced in full for the purpose of convenience:

(1) The learned judge erred in law in that he ought to have held that the Industrial Court misconstrued charge No 4 (at p 37 of the record) and ought to have found the claimant guilty of the charge especially since he being in charge of the payroll had in fact received overtime pay for 50 hours against his claim for 30 hours which was evident from his payslip he himself collected the same day he sent out pay cheque to the bank on 22 November 1985.

(2) The learned judge erred in law in that he ought to have held that the Industrial Court's finding at p 52 of the record 'I find that none of the charges have been proved against the claimant' especially by reason of the claimant's own admission re: charges 5 and 6 is perverse, unreasonable and without any legal basis.

(3) The learned judge erred in law in that he failed to appreciate that the Industrial Court acted without or in excess of jurisdiction by considering irrelevant matters, excluding material evidence, asking the wrong questions and applying the wrong test relating to the five charges whereby it arrived at a conclusion and made the order manifestly unreasonable.

(4) The learned judge erred in law in that he ought to have held that the order of the Industrial Court in computing the various benefits to be paid to the claimant is without any legal basis and in breach of the collective agreement binding both parties.

(5) The learned judge erred in law in that he ought to have held that the Industrial Court acted without or in excess of jurisdiction in that it failed to appreciate that compensation ordered in the circumstances does not fall within the definition of 'wages' under the EPF Act 1951 to warrant EPF contributions.

At the hearing of this appeal we drew at the earliest opportunity the attention of counsel for the appellant while submitting his arguments on the first three grounds that the High Court was not concerned with an appeal but with judicial review by way of certiorari as we felt that counsel was really engaged in arguing the appeal on the merits of the trade dispute. We invited counsel to address us on why certiorari should be granted to the appellant instead of making his submission on the question of erroneous finding of the Industrial Court on the facts as it found them. It seems to us that it should be treated as trite law that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable. There is no dearth of authorities on this proposition — *Tan Hin Jin & Anor* v *Prabhulal G Doshi*[1] per Azmi LP at p 275 quoting Morris LJ in *R* v *Northumberland Compensation Appeal Tribunal, ex p Shaw*[2] at p 357; *Minister of Labour and Manpower & Anor* v *Paterson Candy (M) Sdn Bhd*[3] per Chang Min Tat FJ at p 125; *Hotel Equatorial (M) Sdn Bhd* v *National Union of Hotel, Bar and Restaurant Workers*[4] per Seah FJ at p 368 and *Goon Kwee Phoy* v *J & P Coats (M) Bhd*[5] per Raja Azlan Shah CJ (Malaya) (as he then was) at p 136 paras A-C in the right hand column.

One of the earliest cases on this point is *Colonial Bank of Australasia* v *Willan*,[6] a Privy Council decision where at p 443 Sir James W Colville said:

> But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the superior court by affidavit, are extrinsic to the adjudication impeached. *But an objection that the judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior court cannot quash an adjudication upon such an objection without assuming the functions of a court of appeal, and the power to retry a question which the judge was competent to decide.*
>
> Accordingly, the authorities, of which *R* v *Bolton*, and *R* v *St Olave*, may be taken as examples, *establish that an adjudication by a judge having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein; and that the court of Queen's Bench will not on certiorari quash such an adjudication on the ground that any such fact, however essential, has been erroneously found.* Nor is anything to be found in the cases which have been cited at the Bar, or, so far as their Lordships are aware, in any other decided case, which is really inconsistent with the proposition just stated. (Emphasis added.)

The often quoted case of *Chief Constable of the North Wales Police* v *Evans*[7] is also relevant on this subject. We think it is in order to quote the dictum of Lord Hailsham of St Marylebone LC and Lord Brightman to bring home the point. At pp 143-144, Lord Hailsham LC said:

> This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. *It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions.* It is intended to see that the relevant authorities use their powers in a proper manner.
>
> Since the range of authorities, and the circumstances of the use of their power, are almost infinitely various, it is of course unwise to lay down rules for the application of the remedy which appear to be of universal validity in every type of case. But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. There are passages in the judgment of Lord Denning MR (and perhaps in the other judgments of the Court of Appeal) in the instant case and quoted by my noble and learned friend which might be read as giving the courts carte blanche to review the decision of the authority on the basis of what the courts themselves consider fair and reasonable on the merits. *I am not sure whether Lord Denning MR really intended his remarks to be construed in such a way as to permit the court to examine, as for instance in the present case, the reasoning of the subordinate authority with a view to submitting its own opinion. If so, I do not think this is a correct statement of principle. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court.* (Emphasis added.)

Lord Brightman at p 154 said:

> I turn secondly to the proper purpose of the remedy of judicial review, what it is and what it is not. In my opinion the law was correctly stated in the speech of Lord Evershed ([1963] 2 All ER 66 at 91, [1964] AC 40 at 96). His was a dissenting judgment but the dissent was not concerned with this point. Lord Evershed referred to:
>
> > a danger of usurpation of power on the part of the courts ... under the pretext of having regard to the principles of natural justice ... I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case.
> >
> > *Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.*
>
> I leave these preliminary observations in order to consider the judgments in the Court of Appeal. It was accepted by each member of the court that the case fell within the third of Lord Reid's categories; that the respondent was entitled to a fair hearing; and that he had not had one. However, Lord Denning MR added this:
>
> *I go further. Not only must he be given a fair hearing, but the decision itself must be fair and reasonable.* That is the protection afforded to every servant who is employed under a contract of service. He is protected against unfair dismissal. No less protection should be afforded to a probationer ... It is my opinion that the chief constable was not justified in dispensing with the services of Constable Evans or in requiring him to resign. (Emphasis added.)

At p 155 Lord Brightman continued:

> There is however a wider point than the injustice of the decision-making process of the chief constable. With profound respect to the Court of Appeal, *I dissent from the view that 'Not only must [the probationer constable] be given a fair hearing, but the decision itself must be fair and reasonable.* If that statement of the law passed into authority without

comment, it would in my opinion transform, and wrongly transform, the remedy of judicial review. Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. The statement of law which I have quoted implies that the court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself. (Emphasis added.)

The first ground of appeal in essence impugns the decision of the Industrial Court on its merits and the decision of the judge for agreeing with that decision. On the authorities quoted above it is not the function of the High Court in exercise of its supervisory jurisdiction to hear a dispute 'de novo' and decide it on its merits. The Industrial Court had heard evidence from both sides and submissions by their counsel and it came to a decision exculpating Tang Seng Khow from the allegation in the fourth charge. Clearly this is a case where the tribunal had by virtue of the powers entrusted upon it by the Industrial Relations Act 1967 to weigh and evaluate the evidence of witnesses for the company and the evidence of Tang Seng Khow. It is surely not a case where the Industrial Court had acted on no evidence or had come to a conclusion which on the evidence it could not reasonably come. See *Ashbridge Investments* v *Minister of Housing and Local Government*[8] per judgment of Lord Denning MR at p 374 which was quoted by Abdoolcader SCJ in *Malayan Banking Bhd* v *Association of Bank Officers, Peninsular Malaysia & Anor*[9] at p 207 which reads as follows:

> The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that *the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come*; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law. It is identical with the position when the court has power to interfere with the decision of a lower tribunal which has erred in point of law. (Emphasis added.)

Obviously the Industrial Court accepted the evidence of Tang Seng Khow that he did not deliberately make a false claim in respect of the overtime pay and that it was, through the manipulation of the company's computer by someone unknown that the pay-slip that came out of the computer showed a claim for 50 hours. That mistake cannot be attributed to Tang Seng Khow but to the computer through manipulation by a third party. It was not disputed that Tang Seng Khow had no access to the computer. Therefore, the Industrial Court did not find him guilty on this charge which is not, on evidence, an unreasonable finding.

At first blush the second ground appears to be based on the unreasonableness of the finding of the Industrial Court on the fifth and sixth charges. Unreasonableness here, in our view, was used in the context of the broad sense of that term as expounded by Lord Greene MR in the case of *Associated Provincial Picture Houses Ltd* v *Wednesbury Corp.*[10] 'Reasonableness' here embraces the various heads of ultra vires — such as misdirecting oneself in law, taking into account irrelevant considerations or failing to take into account relevant considerations — which is now known as the *Wednesbury* principles. See p 228 of the *Wednesbury Corp* case.[10]

The second ground though worded so as to appear to be based on unreasonableness in the sense already mentioned in reality is an attack on the finding of facts by the Industrial Court but presented in an ingenious camouflage of legal phraseology to give it a legal touch. As in ground No 1, the question before the Industrial Court in respect of the fifth and sixth charges was whether there was evidence to support the charges and whether upon hearing the evidence of Tang Seng Khow and the witnesses of the company in totality Tang Seng Khow was guilty of these charges. However, on record the Industrial Court did not find him guilty on these charges. Strictly in reliance on the evidence before the Industrial Court under the circumstances there was nothing that the judge could do. What was so perverse about this finding if it was based on evidence that was not challenged or controverted? These are matters for the Industrial Court and not for the High Court to determine and is clearly supported by authorities. Both in respect of ground No 1 and No 2, quite apart from the provisions of s 33B, ie the ouster or privative clause, the authorities clearly decide that in such a case as this the court cannot intervene. See *R* v *Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek*[11] at p 11 where Devlin J said:

> Orders of certiorari and prohibition are concerned principally with public order, it being part of the duty of the High Court to see that inferior courts confine themselves to their own limited sphere. They also afford speedy and effective remedy to a person aggrieved by a clear excess of jurisdiction by an inferior tribunal. But they are not designed to raise issues of fact for the High Court to determine de novo. Accordingly, it has never been the practice to put the party who asserts that the inferior court has jurisdiction to proof of the facts upon which he relies. It is recognized that the inferior court will have made a preliminary inquiry itself and the superior court is generally content to act upon the materials disclosed at that inquiry and to review in the light of them the decision to assume jurisdiction. *This is possible only because the court is not, as I conceive it, finally determining the validity of the tribunal's order as between the parties themselves* (except, perhaps, in a case such as *Symons* v *Rees* (1876) 1 Ex D 416 where the court investigated for itself the facts and pronounced upon them), *but is merely deciding whether there has been a plain excess of jurisdiction or not.* Where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the court should determine it then and there. *But where the dispute turns on a question of fact, about which there*

is a conflict of evidence, the court will generally decline to interfere. (Emphasis added.)

In *R* v *Deputy Industrial Injuries Commissioner, ex p Moore,*[12] Diplock LJ at p 488 dealt with the nature of the evidence that might be accepted by a tribunal. This is what he said:

> These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. *The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his.* (Emphasis added.)

The third ground is nothing more than a repetition of the second ground but in relation to all five charges and worded so as to include all the incidents of the doctrine of ultra vires, ie cases of excess or lack of jurisdiction and unreasonableness in the broad sense as expounded by Lord Greene in *Wednesbury Corp,*[10] to give the appearance of a formidable ground. What it really amounts to is that in arriving at its conclusion and decision on the five charges the Industrial Court acted in excess of its jurisdiction or in other words ultra vires and therefore a nullity. Lord Reid's speech in *Anisminic* v *Foreign Compensation Commission*[13] at p 171 is relevant:

> It has sometimes been said that it is only *where a tribunal acts without jurisdiction that its decision is a nullity.* But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. *It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.* (Emphasis added.)

So is Lord Green MR's speech in the *Wednesbury Corp* case[10] at p 229, explaining the meaning of 'unreasonableness' in its broad or comprehensive sense:

> I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty — those of course, stand by themselves — unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word 'unreasonable'.
>
> It is true the discretion must be experienced reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. *For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'.* (Emphasis added.)

The third ground in fact can be considered together with the first and second ground. This ground also fails for the same reasons as the first and the second ground as we find no basis to come to the conclusion that the decision of the Industrial Court is in excess of jurisdiction or unreasonable and therefore a nullity.

However, there is another aspect of 'unreasonableness' that we think ought to be discussed which was not canvassed or fully canvassed in this appeal. So far we had touched only on the broad sense in which the word 'unreasonableness' had been used in dealing, particularly, with the second and third grounds. There is another sense in which this term had been used and is a separate and independent ground for the remedy of judicial review which, either by design, inadvertence or whatever, thrown in for good measure was engrafted into the last part of the third ground. On this, Lord Greene MR in the *Wednesbury Corp* case[10] gave a brief but clear explanation in the following words on p 229:

> Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short* v *Poole Corp* [1926] Ch 66, at pp 90-91 gave the example of the red-haired teacher, dismissed because she had red hair. *That is unreasonable in one sense.* (Emphasis added.)

At p 234 Lord Green MR continued with the explanation thus:

> Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority has kept within the four corners of the matters which they ought to consider, *they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere.* (Emphasis added.)

Similarly on the same theme Lord Denning in *Griffiths (Inspector of Taxes)* v *JP Harrison (Watford) Ltd*[14] at p 916 had this to say:

> It is now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that it can be dismissed as one which could not reasonably be entertained by them. It is not sufficient that the judge would himself have come to a different conclusion. Reasonable people on the same facts may reasonably come to different conclusions: and often do. Juries do. So do judges. And are they not all reasonable men? *But there comes a point when a judge can say that no reasonable man could reasonably come to that conclusion. Then, but not till then, he is entitled to interfere.* (Emphasis added.)

Lord Diplock in *Bromley London Borough Council* v *Greater London Council*[15] at p 821, describes it as decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them.

Again Lord Denning MR in the *Ashbridge Investments* case[8] spoke of this type of 'unreasonableness' while giving the ratio decidendi of the case. The relevant part of the speech is on p 374 already quoted earlier on and cited in the *Malayan Banking Bhd* case[9] on which counsel for the appellant relied heavily in his contention. It seems to us that the *Malayan Banking Bhd* case[9] was decided solely on this kind of 'unreasonableness', ie 'the court was clearly perverse and so devoid of plausible justification that no reasonable body of persons could have reached it'. It is sometimes referred to as manifest unreasonableness by academic authors and in some authorities. In any event in deciding whether the decision of the Industrial Court is a nullity on the ground of manifest unreasonableness we are guided by Lord Greene's dictum in the *Wednesbury Corp* case[10] at p 230:

> *It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere.* That, I think, is quite right; *but to prove a case of that kind would require something overwhelming,* and, in this case, the facts do not come anywhere near anything of that kind. I think Mr Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether. (Emphasis added.)

Assuming that it was intended that manifest unreasonableness was a separate ground of appeal, we reject the contention that the decision of the Industrial Court is so manifestly unreasonable that no body of persons could have reached it because there is no basis for us to reach such a conclusion and there is no overwhelming evidence to persuade us to arrive at that conclusion. In our view the Industrial Court had acted within the four corners of the dispute and in arriving at its decision it did not reach it absurdly. On this ground also the appeal should fail.

The fourth and fifth grounds in essence are similar and we will consider them as one, although it must be stressed here that the allegation by the appellant that the Industrial Court in making the award with regard to the compensation as alternative remedy to reinstatement is in breach of the collective agreement is a matter within the ambit of s 56(1) of the Act. It would seem further, that the breach of the collective agreement as the basis of the appeal was not seriously pursued in this appeal. We would consider these grounds as they were argued before us. Substantially, the appellant's complaint against the Industrial Court's award is that by including bonus and employer's contributions to the backwages paid to Tang Seng Khow which formed part of the compensation, the Industrial Court had taken into account irrelevant matters, had misdirected itself on the law, acted upon an incorrect basis in fact, had committed an error in point of law and so acted in excess of jurisdiction. The award in this case, therefore, was a nullity. The authority cited for this contention was the *Malayan Banking Bhd* case.[9] Counsel for the appellant urged upon us to apply the principles in that case as expounded and extracted from various authorities by Abdoolcader SCJ. We pause here for a moment to emphasize that error on the face of the record which is a separate head as a ground for certiorari was never pleaded as a ground of appeal and therefore we would not deal with this issue.

The questions for our determination are really whether: (a) bonus under art 23 of the collective agreement is justifiably payable to Tang Seng Khow under the circumstances in this case; and (b) the backwages are wages for the purpose of, and therefore attracted the application of, the Employees Provident Fund Act 1951 ('the EPF Act'). Only if the answers to both questions are in the negative can it be said that the Industrial Court acted in excess of jurisdiction in awarding them as parts of the compensation.

To put the question in another way did the Industrial Court in making the award in respect of these two items in the compensation awarded have jurisdiction to make it or in the intervening stage while engaged in a proper inquiry had the Industrial Court asked itself the wrong question or taken into account matters which it was not directed by legislature to take into account and thereby stepped outside its jurisdiction, turning its inquiry into something not directed and failing to make the inquiry which the legislature directed. If, and only if, the Industrial Court did all these things, truly, it can be said that the purported award is a nullity. See Lord Pearce's explanation of the expression 'lack of jurisdiction' in the *Anisminic* case[13] at p 195B-C.

Applying these principles to the instant case, it cannot be seriously disputed that the Industrial Court is given wide powers in settling trade disputes under the Act and in the process it is obligatory upon the Industrial Court to exercise its powers under s 30(5), (5A) and (6). It was clearly in exercise of these powers that

the Industrial Court awarded the compensation to comprise backwages, bonus, compensation in lieu of reinstatement and employer's contribution to the Employees Provident Fund (EPF). It must be mentioned here that the question whether the Industrial Court has power to award compensation in lieu of reinstatement had already been settled by the Federal Court in *Dr Dutt* v *Assunta Hospital*[16] a pp 313C-I and 314A-F.

Counsel for the appellant submitted that bonus should not be included because under art 23(3) of the collective agreement no bonus is payable where the employee is dismissed for gross misconduct involving dishonesty, theft, misappropriation of company's funds and the like and resignation to avoid dismissal in respect thereof. Quite apart from the fact that Tang Seng Khow was purportedly dismissed for misconduct but not involving dishonesty, theft, misappropriation of company's funds, the payment of bonus under the circumstances of this case could be supported on the authority of the Federal Court of *Goon Kwee Phoy*.[5] In that case the Industrial Court ordered the defendant company, J & P Coats Sdn Bhd, to pay the plaintiff, Goon Kwee Phoy, (a) compensation in lieu of reinstatement; (b) bonus; and (c) compensation for loss of future earnings as it was held that Goon Kwee Phoy was dismissed without just cause or excuse. The Federal Court held that all these payments as compensation, including bonus, were not acts ultra vires the Industrial Relations Act 1967 or to put it in another way, in excess of jurisdiction on the part of the Industrial Court, acting under s 30(6). On the authority of *Goon Kwee Phoy*'s case[5] therefore, the validity of the payment of bonus is beyond question.

One fundamental difference between the award in the present case and *Goon Kwee Phoy*'s case[5] in so far as the award of compensation is concerned is the manner the award was formulated. In *Goon*'s case[5] Industrial Court expressly mentioned each payment as a separate compensation by itself, ie (a) compensation in lieu of reinstatement and (b) compensation for less of future earnings. In the present case the word 'compensation' was employed to embrace cumulatively each item of payment. In other words what were actually paid to Tang Seng Khow were backwages, bonus, amount deducted for period of six days suspension, compensation in lieu of reinstatement and employer's contribution to EPF. For the purpose of convenience the word compensation was used to refer to all these cumulative payments as an alternative remedy to reinstatement. Since backwages were specifically awarded which in fact are wages he would have earned had his services not been unlawfully terminated it would be a travesty of justice to deny Tang Seng Khow the employer's contribution to EPF. Since wages were paid, call it backwages, if you like, logically and lawfully the employer's EPF contributions are payable under the EPF Act. What counsel for the appellant did was to make an attempt to distinguish between wages as such and compensation in lieu of reinstatement. In other words, we were urged to look at the award collectively instead of at each individual items. Looked at collectively there was only one payment, ie compensation for reinstatement as an alternative remedy and therefore, so the argument goes, no EPF contributions would arise. We regret we are unable to accept this rather specious argument as it seemed to us counsel was engaged in a futile hair-splitting exercise over this word. Looking at it in a pragmatic way the fact of the matter is that Tang Seng Khow was paid various payments to which he was entitled, invariably and inexorably, backwages is one of them. Once it is accepted that backwages are wages then it is inevitable that EPF contributions would legally follow in the same way as the payment of bonus is inevitable once it is accepted that Tang Seng Khow would have been entitled to serve the company during the period from 1 January 1986 to 24 February 1988 for the purported and unlawful dismissal. In our view it matters not if computation of wages is described as a means to determine the quantum of compensation because if this proposition is correct then why should not employer's contribution also be equally taken into account in the computation since the Industrial Court is under a legal duty to act according to equity and good conscience.

Counsel for the appellant quoted the case of *Employees Provident Fund Board* v *MS Ally & Co Ltd*[17] in his contention that compensation was not wages for the purpose of the EPF Act. This case can clearly be distinguished from the present appeal because in that case the payment on which EPF contributions were based were shares of profits which the Federal Court held were not wages. Unlike the present case, Tang Seng Khow was actually paid wages for the period he would have earned but for the unlawful dismissal. Therefore the *Employees Provident Fund Board*'s case[17] is not applicable to the instant case.

The other case on which counsel for the appellant relied heavily is the *Malayan Banking Bhd* case[9] which we had touched on briefly earlier on. Although the headnotes in that case under 'Held' enumerated five main principles on which the case was decided there is truly only one ground for the decision which could properly be regarded as the ratio decidendi of the case and therefore binding on future like cases. That case was decided solely on the ground that on the facts the decision of the Industrial Court was clearly perverse and so devoid of plausible justification that no reasonable body of persons could have reached it. This is based on an observation made by Lord Diplock in *Bromley London Borough*'s case[15] at p 81 and Lord

Denning's dictum in *Ashbridge*'s case.[8] This decision is based on manifest unreasonableness which we have discussed earlier on in the judgment as a separate independent ground for certiorari. We think it would be necessary to say a few words on Lord Diplock's observation in *Bromley London Borough Council*'s case[15] which was the basis for Abdoolcader SCJ's decision in the *Malayan Banking Bhd* case.[9] Actually, Lord Diplock was explaining how the *Wednesbury* principles had been subjected to subdivision in the course of the argument in *Bromley*'s case.[15] Quite obviously Lord Diplock did not lay down a new principle as a ground for certiorari but quoted out of its context. The relevant part of Lord Diplock's speech at pp 820 and 821 reads:

> In the argument before this House, as in the courts below, this has been treated as involving two distinct questions. These have been referred to respectively as: the question of ultra vires, which has been treated as a pure question of construction of the Transport (London) Act 1969; and the question of discretion, viz the exercise of a statutory discretion in a manner that was unlawful under what in administrative law has become known as the *Wednesbury* principle stated by Lord Greene MR in *Associated Provincial Picture Houses Ltd* v *Wednesbury Corp* [1948] 1 KB 223, in terms that have been frequently cited ever since. The *Wednesbury* principle has in turn been subjected to subdivision in the course of the argument into decision reached in the exercise of a statutory discretion that are unlawful because it can be shown that in reaching the decision the body exercising the discretion has acted on an erroneous view of the applicable law; *and decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them.* (Emphasis added.)

The latter part of Lord Diplock's explanation in fact refers to the manifest unreasonableness as expounded by Lord Greene in the *Wednesbury Corp* case[10] which we have already adverted to earlier on in this judgment.

The third principle under 'Held' is only an illustration of the principles that it is usually proper to treat a decision-maker's task of fact-finding and the treating of factual inference from established facts as falling within the decision-maker's jurisdiction, unless the decision-maker has reached absurd results or reached results absurdly which is not much different in essence from the fifth principle, ie perverse finding so devoid of plausible justification that no reasonable body of persons could have reached it which is saying the same thing using different language.

So the question is whether in allowing employer's EPF contribution as an item in the compensation the Industrial Court had reached absurd results or reached results absurdly or made a decision which was clearly perverse and so devoid of plausible justification that no reasonable body of persons could have reached it. We are also of the view that the *Malayan Banking Bhd* case[9] is not directly in point to the present case in that the facts therein come nowhere near anything of the kind in this case and more fundamentally manifest unreasonableness of the award in respect of bonus and employer's EPF contributions was not the ground of appeal as it was made out to be in the fourth and fifth grounds of appeal.

Even assuming we were wrong in construing backwages or the compensation taken as a whole as wages and therefore attract the application of the EPF Act, such errors are within jurisdiction and not errors going to jurisdiction to render the award a nullity. Applying the principles in *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees Union*[18] per Lord Fraser of Tullybelton at p 168; *R* v *Governor of Brixton Prison, ex p Armah*[19] per Lord Reid at p 234; and *Pearlman* v *Keepers and Governors of Harrow School*[20] per Lord Geoffrey Lane LJ at p 74; we are of the view that certiorari will not lie.

In the result we reject the appellant's contention that the Industrial Court acted in excess of jurisdiction or had reached its conclusion absurdly or reached an absurd conclusion in allowing the payment of bonus and employer's EPF contributions and would also dismiss the appeal on these two last grounds. We would order costs both here and in the court below.

Appeal dismissed.

Solicitors: *TM Varughese & Co; Genga Maha Wong & Co.*

Reported by *Prof Ahmad Ibrahim*